

**STATE OF CALIFORNIA
ENERGY RESOURCES CONSERVATION
AND DEVELOPMENT COMMISSION**

In the Matter of:)	Docket No. 00-AFC-1C
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)	
GATEWAY GENERATING STATION)	STAFF RESPONSE
)	AND RECOMMENDATIONS
)	TO COMPLAINT
_____)	BY ROB SIMPSON, et. al.

SUMMARY

On June 5, 2009, the Contra Costa branch of the Association of Community Organizations for Reform Now (ACORN) filed a Complaint pursuant to California Code of Regulations, Title 20, section 1237, regarding the operational status and efficiency of the Gateway Generating Station (Gateway), which is owned and operated by Pacific Gas and Electric (PG&E). Staff completed its investigation in that matter and filed its Response and Recommendations on July 3, 2009, recommending that the complaint be dismissed for lack of merit.¹

On June 29, 2009, Rory Cox of the Local Clean Energy Alliance filed a "Complaint" regarding the same matter. That "Complaint" offered no new information and raised no additional issues that were not already addressed in Staff's Response and Recommendations regarding ACORN's Complaint. Staff filed its Response and Recommendations on July 14, 2009, recommending that the complaint filed by Rory Cox be consolidated with the former complaint, and that this complaint be dismissed for lack of merit.

On July 17, 2009, a document was submitted by CARE, Bob Sarvey, Rob Simpson, and Mike Boyd entitled "Complaint Request for Official Notice Comments on Staff Report Comments on Amendment Petition to Intervene." Among other things, this document purports to be a complaint filed under Title 20, California Code of Regulations, section 1237, a complaint and request for investigation and jurisdictional determination under section 1231, a request for official notice, a petition to intervene, and comments on Staff's Report and Recommendations filed on July 3, 2009. Among other things, the document requests an "item by item verification of each condition" in the Energy Commission's certification of the Gateway facility. For the reasons discussed below, the Committee should dismiss this document for insufficiency, and for lack of merit.

¹ STAFF RESPONSE AND RECOMMENDATIONS TO COMPLAINT BY ASSOCIATION OF COMMUNITY ORGANIZATIONS FOR REFORM NOW (ACORN), In the matter of Gateway Generating Station, 00-AFC-1C, July 3, 2009 (hereby incorporated by reference). It should be noted that staff recommended in the alternative that count 3 of that complaint could be addressed in the amendment proceeding where emission reduction requirements will be analyzed with respect to the minor changes proposed by PG&E.

I. BACKGROUND

Gateway (formerly known as the Contra Costa Power Plant Unit 8) was certified by the Energy Commission on May 30, 2001. The facility is located on Wilbur Avenue, east of the city of Antioch, in Contra Costa County. Construction of the facility started late in 2001 and was suspended in February of 2002 due to financial difficulties of the owner Mirant Delta, LLC. On July 19, 2006, the Energy Commission approved the addition of PG&E as co-owner of the project with Mirant. On January 3, 2007, the Energy Commission approved PG&E's petition to remove Mirant as a co-owner and change the name of the facility to the Gateway Generating Station.

On December 19, 2006, PG&E filed a petition with the Energy Commission to amend the Energy Commission's Decision (decision) on Gateway. The Petition sought to replace the wet cooling tower and surface condenser with an air cooled condenser (ACC), eliminate the use of steam power augmentation, and eliminate the use of San Joaquin River water as the cooling water source for Gateway, as well as to make other minor changes associated with the proposed amendment. The Energy Commission approved this petition on August 1, 2007. PG&E restarted construction in February of 2007 and, although the facility was not 100% complete, began commercial operation on January 4, 2009.

On January 16, 2008, PG&E filed a Petition to Amend, proposing certain minor equipment changes and Air Quality Conditions of Certification in concert with the August 1, 2007 amendment. That petition was withdrawn on February 13, 2009, and a new Petition to Amend was filed on May 8, 2009, again requesting certain minor changes to the project. Those changes include the following:

- Replace the permitted natural gas-fired preheater with a smaller dewpoint heater and increase allowable daily hours of operation.
- Replace a motor driven fire water pump with a 300 kW Diesel fire pump at the facility.
- Revise the facility's PM10 emission limits to reflect elimination of the wet cooling tower.
- Revise references to "Contra Costa Unit 8" and "CC8" to reflect the current project name.
- Delete references to power augmentation.
- Make other minor conforming changes for consistency with the District's requirements.

That petition is now being analyzed by staff, and it is anticipated that the petition to amend will be considered for possible approval at the Energy Commission's business meeting on August 26, 2009.

II. INVESTIGATION AND ANALYSIS

A. Title 20, California Code of Regulations, section 1231, is inapplicable to existing facilities that have been certified by the Energy Commission pursuant to Public Resources Code Section 25500 et. seq.

Title 20, California Code of Regulations, section 1231, provides in relevant part:

Any person, including but not limited to the commission staff or the owner or operator of a power plant or transmission line, may file a complaint alleging a violation of a statute, regulation, order, program, or decision adopted, administered, or enforced by the commission. ***Any complaint alleging non-compliance with a commission decision adopted pursuant to Public Resources Code Section 25500 et. seq. must be filed solely in accordance with section 1237.*** Any person may also file a request for investigation, including a request for a jurisdictional determination regarding a proposed or existing site and related facilities. [Emphasis added]

The language of section 1231 is mirrored within section 1237, which begins:

Any person must file any complaint alleging noncompliance with a commission decision adopted pursuant to Public Resources Code Section 25500 and following solely in accordance with this section.

Gateway was certified by the Energy Commission on May 30, 2001. As with all energy generating facilities licensed by the Energy Commission, pursuant to Public Resources Code section 25523, the Energy Commission prepared a written decision in this matter, which was adopted at a regularly scheduled and publicly noticed business meeting. There is therefore no question as to the Energy Commission's jurisdiction over the Gateway facility, and thus there is no need for a jurisdictional determination regarding the facility.

Nor is a complaint filed under section 1231 authorized in this circumstance. The language of that section is specific: "Any complaint alleging non-compliance with a commission decision adopted pursuant to Public Resources Code section 25500 et seq. must be filed solely in accordance with section 1237." Thus, any action sought by a complainant regarding Gateway or any other Energy Commission-licensed facility must be brought pursuant to section 1237.

B. Pursuant to Title 20, California Code of Regulations, section 1237, the complaint should be dismissed for insufficiency and for lack of merit.

Title 20, California Code of Regulations, section 1237(a), provides in relevant part:

Any person must file any complaint alleging noncompliance with a commission decision...solely in accordance with this section. All such complaints...shall include the following information:

- (1) the name, address, and telephone number of the person filing the complaint (complainant);
- (2) the name, address, and telephone number of the person owning or operating, or proposing to own or operate, the project which is the subject of the complaint;
- (3) a statement of facts upon which the complaint is based;
- (4) a statement indicating the statute, regulation, order, decision, or condition of certification upon which the complaint is based;
- (5) the action the complainant desires the commission to take;
- (6) the authority under which the commission may take the action requested, if known, and;
- (7) a declaration under penalty of perjury by the complainant attesting to the truth and accuracy of the statement of facts upon which the complaint is based.

1) Sufficiency of the complaint

Section 1237(a)(3) requires that a complainant provide a statement of facts upon which the complaint is based. Here, CARE et.al. provides the following as the entirety of its factual basis:

“(3) a statement of the facts upon which the complaint or request for investigation is based;

The 530-megawatt project was certified by the Energy Commission on May 30, 2001. Construction of the facility started late in 2001 and was suspended in February of 2002 due to financial difficulties. On July 19, 2006, the Energy Commission approved the addition of Pacific Gas and Electric (PG&E) as co-owner of the project with Mirant Delta, LLC. On January 3, 2007, the Energy Commission approved PG&E's petition to remove Mirant as a co-owner and change the name of the facility to the Gateway Generating Station. PG&E restarted construction in February of 2007. The facility is located on Wilbur Avenue, east of the city of Antioch, in Contra Costa County.

We incorporate the complaint filed by Golden Gate University Environmental law and Justice Clinic (GGU) on behalf of Contra Costa branch of the Association of Community Organizations for Reform Now (ACORN). and GGU also submitted to the Commission a “Notice of relevant document” Dated June 25, 2009 in it GGU identified “the Bay Area Air Quality Management District (BAAQMD) filed a pleading in a case involving the Gateway Generating Facility before Environmental Protection Agency's Environmental Appeals Board, which admitted “there is no PSD permit” for the Gateway Facility. I am the Petitioner in that appeal. CARE and Bob Sarvey have applied to intervene. CARE is an intervener in the original AFC proceeding Care and Bob Sarvey have also both commented to the Bay Area Air Quality Management District in its permitting actions regarding this facility, so we all have an interest in these proceedings.

REQUEST FOR OFFICIAL NOTICE

Pursuant to 1213 request for official notice of EAB Appeal 09-02 The appeal pertains to the Clean Air Act New Source Review provisions of Prevention of Significant Deterioration (PSD) regulations that are regularly considered in siting actions. To the extent that the Commission declines not to take official notice of these proceedings the following briefs are attached as part of this Declaration. A EAB Petition B Bob Sarvey comments on PSD permit C EAB jurisdictional Brief"

The "complaint" filed by CARE et.al. asserts that "PG&E is in violation of many of the Commission's; Commission [sic] Final Decision on the Contra Costa Project Dated May 30, 2001." ("Complaint," p. 3) However, CARE et.al. fail to provide a statement of facts to support their claim that a Condition of Certification is being violated. Furthermore, the "complaint" fails to discuss how the factual basis set forth in the incorporated ACORN complaint is relevant to the allegations filed by CARE et.al..

Among other things, the "complaint" requests an "item by item verification of each condition" in the Energy Commission's certification of the Gateway facility. ("Complaint," p. 2) Absent a factual basis to support its claims, the complainants' request is for nothing more than a fishing expedition.

Section 1237(a)(4) requires that the complainant include "a statement indicating the statute, regulation, order, decision, or condition of certification upon which the complaint is based." Staff notes that the "complaint" does provide a list of seven Conditions of Certification that the complainant characterizes as being "most likely not in conformance." ("Complaint," p. 3) The complaint includes in this list reference to several Federal permits, the enforcement of which, as discussed below, is left to the federal agency. However, combined with the lack of a statement of facts to support their claims, the implication made by CARE et.al. that *all* of the Conditions of Certification are being violated is overly broad.

Section 1237(a)(7) further requires "a declaration under penalty of perjury by the complainant attesting to the truth and accuracy of the statement of facts upon which the complaint is based." The "complaint" submitted by CARE et.al contains an unsigned declaration that provides: "[w]e certify under the penalty of perjury in the state of California that the above is true and correct and that this document was signed on July 17, 2009" and lists Rob Simpson, Robert Sarvey, and Mike Boyd. As of the writing of this response, staff is unaware of any declaration signed by any of these individuals. Absent a signed declaration, the complaint does not comport with the requirements of Section 1237(a)(7).

Based on the above, the "complaint" is insufficient, and should be dismissed.

2) Merits of the complaint

It appears that the thrust of CARE et. al.'s submission is directed at perceived non-compliance with certain requirements associated with the BAAQMD's PSD permit, as well as with the requirements for emission reduction credits. Insofar as the CARE "complaint"

has incorporated the Complaint filed by ACORN in these matters, staff would direct the Committee's attention to its July 3, 2009 Response and Recommendations, which demonstrates the lack of merit as to those allegations.

CARE et.al.'s complaint also references an appeal that has been filed before the Environmental Protection Agency's (EPA) Environmental Appeals Board (EAB). The complainant asserts that "[s]ince the Federal regulations are codified in BAAQMDS regulations they are also State law issues. To the extent the Commission rejects its Federal enforcement authority it should enforce pursuant to the State law programs." ("Complaint" pp. 4-5).

Although the Energy Commission's license is "in lieu" of all other state permits, its license is not "in lieu" of federal permits. (Pub. Resources Code, § 25500.) The PSD permit is a federal permit, whether issued by USEPA or by an air district with delegated authority. (*Greater Detroit Res. Recovery Auth. V. U.S.E.P.A.* (6th Cir. 1990) 916 F.2d 317, 320-321; *In re Milford Power Plant*, 8 E.A.D. 670, 673 (EAB 1999); 42 U.S.C. 7410(c)(3).) The PSD permit requires the cleanest feasible emissions controls, and requires elaborate air quality modeling to establish that air quality in an attainment area will not be adversely affected by new emissions. Federal law provides that EPA may delegate this permit authority to a state agency (here the BAAQMD), which then issues the federal permit according to federal PSD requirements, acting pursuant to federal law as the surrogate EPA Regional Director. (40 C.F.R. 124.41 [defines E.P.A. "Regional Administrator" to mean the "chief administrative officer of the delegate agency" when a state agency acts as EPA's delegate]; 45 Fed. Reg. 33413 [describes federal delegate PSD program, providing that "a delegate state stands in the shoes of the [EPA] Regional Administrator," and that "[a] permit issued by a delegate is still an 'EPA-issued permit.'"])

Staff notes that PG&E is working with the US Environmental Protection Agency (USEPA) to obtain an updated PSD permit as required by the 2001 Certification. Furthermore, even if the project currently lacked a PSD permit, the absence of such a permit would not invalidate the Energy Commission's certification. (See staff's July 3, 2009 Report and Recommendations for the ACORN complaint.) The enforcement authority over the specific terms and conditions of a PSD permit are with the USEPA.

Based on the above, the "complaint" is without merit, and should be dismissed

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III. RECOMMENDATIONS

Title 20, California Code of Regulations, section 1237(e) sets forth the options facing the committee upon issuance of the staff report on a complaint:

Within 30 days after issuance of the staff report, the committee shall:

- (1) dismiss the complaint upon a determination of insufficiency of the complaint or lack of merit;
- (2) issue a written decision presenting its findings, conclusions, or order(s) after considering the complaint, staff report, and any submitted comments; or
- (3) conduct hearings to further investigate the matter and then issue a written decision.

Because CARE et al.'s "complaint" is in great part identical to those filed by ACORN and Rory Cox, the three should be consolidated and decided in the same proceeding. Such consolidation of issues in the amendment proceeding would dispense with what could otherwise end up being duplicative or overlapping proceedings and would save valuable time and resources. The Committee should then consider Staff's Response and Recommendations filed July 3, and July 14, 2009, as applying to CARE et. al.'s "complaint", and dismiss the complaint for the reasons stated.

Pursuant to section 1237(e)(1), staff recommends that the Committee dismiss the "complaint" filed by CARE et. al. for insufficiency and for lack of merit as discussed above.

Date: July 29, 2009

Respectfully Submitted,

_____/S/
KEVIN W. BELL
Senior Staff Counsel



**BEFORE THE ENERGY RESOURCES CONSERVATION AND DEVELOPMENT
COMMISSION OF THE STATE OF CALIFORNIA
1516 NINTH STREET, SACRAMENTO, CA 95814
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**IN THE MATTER OF THE COMPLAINT AGAINST
GATEWAY GENERATING STATION**

**Docket No. 00-AFC-1C
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DECLARATION OF SERVICE

I, **Chester Hong**, declare that on **July 29, 2009**, I served and filed copies of the attached **STAFF RESPONSE AND RECOMMENDATIONS TO COMPLAINT BY ROB SIMPSON, et al.** The original document, filed with the Docket Unit, is accompanied by a copy of the most recent Proof of Service list. The document has been sent to both the other parties in this proceeding (as shown on the Proof of Service list) and to the Commission's Docket Unit, in the following manner:

(Check all that Apply)

For service to all other parties:

 x sent electronically to all email addresses on the Proof of Service list;

 x by personal delivery or by depositing in the United States mail at Sacramento, California with first-class postage thereon fully prepaid and addressed as provided on the Proof of Service list above to those addresses **NOT** marked "email preferred."

AND

For filing with the Energy Commission:

 x sending an original paper copy and one electronic copy, mailed and emailed respectively, to the address below **(preferred method)**;

OR

 depositing in the mail an original and 12 paper copies, as follows:

CALIFORNIA ENERGY COMMISSION

Attn: Docket No. 07-AFC-8

1516 Ninth Street, MS-4

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I declare under penalty of perjury that the foregoing is true and correct.

_____/s/_____
CHESTER HONG